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Transportes Aereos de Angola v. Ronair, Inc.: Nonaccess to U.S. Courts by Unrecognized Governments - A New Exception

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Transportes Aereos de Angola v. Ronair, Inc.: Nonaccess to U.S. Courts by Unrecognized Governments — A New Exception?

As a general rule, unrecognized foreign governments and their instrumentalities are not granted access to U.S. courts.[1] Recently, however, in *Transportes Aereos de Angola v. Ronair, Inc.*,[2] the United States District Court for Delaware refused to follow the general rule, or to apply one of the recognized exceptions[3] to the rule. Instead, a juridical entity of the Ministry of Angola was granted standing to sue at a time when the People's Republic of Angola (Angola) maintained no diplomatic relations with the United States.[4] Thus, the *Ronair* decision may represent the creation of a new exception to the general rule of nonaccessibility.

Transportes Aereos de Angola (TAAG), which was organized under the laws of Angola and had its principal place of business in Angola,[5] brought suit against two U.S. corporations, Jet Traders Investment Corporation (Jet Traders), and Ronair, Inc. (Ronair), for breach of contract in the sale of a Boeing aircraft. TAAG had entered into a written agreement to purchase the aircraft from Jet Traders, who then contracted to buy the plane from Tekair, Ltd. (Tekair). Title was held by the other defendant, Ronair, who had contracted to sell the aircraft to Tekair. Tekair never delivered the aircraft to Jet Traders leaving Jet Traders unable to meet its contractual obligations to TAAG.

After the delivery date had passed and TAAG had not received its aircraft, TAAG tendered written notice to Jet Traders that it was terminating the contract and initiated suit against Ronair and Jet Traders. Ronair moved to dismiss the complaint, basing its motion on a series of decisions that had refused litigant status to unrecognized governments and their instrumentalities.[6] Jet Traders moved to dismiss for lack of in

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[1] *See, e.g.*, Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); Russian Socialist Federated Soviet Republics v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923).

[2] 544 F. Supp. 858 (D.C. Del. 1982).

[3] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934); Upright v. Mercury Business Machines Co., 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961).

[4] 544 F. Supp. at 861. *See also infra* note 84.

[5] 544 F. Supp. at 861.

[6] *Id. See, e.g.*, Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd*, 478 F.2d 231 (2d Cir.

personam jurisdiction.[7] The district court dismissed both motions and allowed TAAG's action to proceed.

To understand the district court's holding, it is necessary to understand the process of recognizing foreign governments and to review the history of excluding unrecognized governments and their instrumentalities from U.S. courts.

Generally, " '[r]ecognition' refers to either the formal act or the continuing relationship established by the act of recognition between the recognizing state and the entity or regime recognized."[8] Under international law, the recognition of a foreign state or government is exclusively a political function.[9] A country has neither a duty to grant nor a right to receive recognition.[10] A new state or government will usually send a formal communication requesting recognition, which may be granted by the issuance of either a written or oral proclamation, or by implication.[11] Once recognized, the foreign state or government acquires legal capacity to sue in U.S. courts, and may assert a right for itself and its property to be immune from suit.[12]

In the United States, it is well-settled that the courts are precluded from determining or affecting recognition of a foreign state or government.[13] The United States Supreme Court in *United States v. Pink*[14] held that the President has exclusive authority to recognize and engage in diplomatic relations with foreign sovereigns.[15] Thus, the courts are con-

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1973), *cert. denied*, 415 U.S. 931 (1974). *See also* Pfizer, Inc. v. India, 434 U.S. 308 (1978); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).

[7] Jet Traders' motion to dismiss was denied because the Delaware statute provided for personal jurisdiction. 544 F.2d at 864-66. *See* DEL. CODE ANN. tit. 10, § 3104 (Supp. 1982).

[8] Note, *The Impact of Constitutive Recognition on the Right to Self-Determination: An Analysis of United States Recognition Practices Utilizing the Chinese Question as a Guide*, 14 VAL. U.L. REV. 123, 123 (1979). *See generally* H. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 99-193 (2d ed. 1952); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89-108 (2d ed. 1973); 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 161-387 (1944); H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947); 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 67-248 (1906); M. SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 266-90 (1968); 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-753 (1963); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 94-114 (1965).

[9] Alder, *The Unrecognized Government in the Courts of the United States*, 5 VA. J. INT'L L. 36, 36 (1964).

[10] *Id. See generally* H. LAUTERPACHT, *supra* note 8 (Lauterpacht's thesis that there is a right and duty to recognize has not been accepted); *Cf.* 2 M. WHITEMAN, *supra* note 8, at 1-37.

[11] Note, *supra* note 8, at 123.

[12] Alder, *supra* note 9, at 36. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 137 (H. Lauterpacht 8th ed. 1955); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-10; Underhill v. Hernandez, 168 U.S. 250 (1897).

[13] Alder, *supra* note 9, at 36.

[14] 315 U.S. 203 (1942).

[15] *See id.* at 223-26. The authority had been recognized previously in the leading case of United States v. Belmont, 301 U.S. 324 (1937); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *Cf.* Note, *Access to Courts by Juristic Entities Created by Unrecognized Governments: Federal Republic of Germany v. Elicofon*, 12 COLUM. J. TRANSNAT'L L. 155, 159 (1973):

> [T]his rule is not adhered to closely, although in practice courts will, at least, pay lip service to executive prerogative. In the first place, the notion that recognition

strained to recognize the sovereignty of a politically recognized government and accept the validity of its acts.[16]

Traditionally, two kinds of recognition may be granted: *de facto* and *de jure*.[17] *De facto* recognition implies a willingness to maintain consular or diplomatic contacts, however limited, and is usually given during a transitional period of a territory, when there is a lack of confidence in the new government's stability.[18] *De facto* recognition is more tentative and less committal than *de jure* recognition.[19] *De jure* recognition implies a preparedness for normal diplomatic relations and is the fullest type of recognition.[20] In addition, *de jure* recognition demonstrates confidence in the stability of the government and the State, the expectation that international obligations will be met, and a willingness to maintain normal diplomatic relations.[21]

It is through the process of recognition that a state becomes an international person,[22] able to enjoy the benefits of membership in the international community and friendly relations with the United States.[23]

> Recognition . . . once given cannot be withdrawn while that government continues in power. The act of severing diplomatic relations does not withdraw recognition but merely deprives the foreign state of the benefit of friendly relations with the United States. [The government] continues to be the recognized sovereign power over that State and it loses none of the rights and privileges appurtenant to recognition. Only when that government ceases to exist, usually through a revolution or in some other unconstitutional manner, does recognition terminate. The executive then determines whether to grant recognition to the new head of state or the new government. When the government is recognized by the United States, all acts of that government preceding recognition are validated. Recognition relates back to the origins of the previously un-

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> of a government is solely a political prerogative of the executive branch has been criticized because recognition itself is somewhat artificial and because the executive department really possesses no special capacity to judge the "existence" of a government. In the second place, the peculiarities of individual cases have demanded the bending of this purportedly absolute rule. For instance, political nonrecognition has not always been an effective bar to suits *against* an unrecognized government, to suits involving corporations controlled by unrecognized governments, or to suits involving private affairs affected by the laws of unrecognized governments.

Id. (footnotes ommitted) (emphasis in original).

The relationship between judiciary and executive has been considered in numerous articles. *See, e.g.*, Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960); Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 COLUM. L. REV. 805 (1964); Lillich, *The Proper Role of the Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970); Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277 (1962).

16 Alder, *supra* note 9, at 36.

17 Nedjati, *Acts of Unrecognized Governments*, 30 INT'L & COMP. L.Q. 388, 388 (1981).

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Alder, *supra* note 9, at 37. *See also* 1 OPPENHEIM, *supra* note 13, at 125-29.

23 Alder, *supra* note 9, at 37.

recognized government.[24]

The decision to recognize a foreign government that comes to power through extra-constitutional means usually involves a subtle interplay between the principles of international law and international politics.[25] Three major approaches have developed which reflect this interplay: (1) the Traditional Approach; (2) the Estrada Doctrine; and (3) the Tobar, or Betancourt, Doctrine.[26]

If a recognizing state utilizes the Traditional Approach, it will seek to determine:

1. whether the government is in de facto control of the territory and in possession of the machinery of the state;
2. whether the government has the consent of the people, without substantial resistance to its administration, that is, whether there is public acquiescence in the authority of the government; and
3. whether the new government has indicated its willingness to comply with its obligations under treaties and international law.[27]

The first criterion for recognition in the Traditional Approach is fundamental to all three approaches.[28] The second criterion is more controversial and is usually interpreted as the acquiescence of the people to the new government.[29] The third criterion originates in the practices of the United States in the last half of the nineteenth century in dealings with unstable Caribbean and Latin American states, and is largely a formalistic requirement.[30] Once all three criteria have been met, the executive branch makes a political decision as to whether recognition would be in the best interest of the recognizing state.[31]

The Estrada Doctrine was first espoused by a former Mexican Foreign Minister, Don Genaro Estrada, in 1930.[32] Under the Estrada Doctrine, only new *states* are recognized, thereby eliminating the recognition of governments that come to power through extra-constitutional means.[33] Relations with outside states remain the same when a new *gov-*

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[24] *Id.* at 37 (footnotes ommitted).

[25] L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS 5 (1978).

[26] *Id.* at 5.

[27] *Id.* at 5-6 (quoting 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 72-73 (1963)).

[28] *Id.* at 6.

[29] *Id.* at 6-7.

[30] *Id.* at 7. *See also* H. LAUTERPACHT, *supra* note 8, at 109-114 (1947).

[31] In making the decision the state will usually consider:

> the existence or non-existence of evidence of foreign intervention in the establishment of the new regime; the political orientation of the government and its leaders; evidence of intention to observe democratic principles, particularly the holding of elections; the attitude of the new government toward private investment and economic improvement. Importantly, also, the interest of peoples, as distinguished from governments, is of concern. These, and other criteria, depending upon the international situation at the time, have been considered, with varying weight.

2 M. WHITEMAN, *supra* note 8, at 73 (1963).

[32] L. GALLOWAY, *supra* note 25, at 8.

[33] In a speech, Estrada stated:

> [T]he Mexican government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice

ernment comes to power through whatever means.[34] The Estrada Doctrine follows the principle of unfettered national sovereignty and rejects interference with the domestic affairs of one state by another through the granting or withholding of recognition.[35]

The Tobar, or Betancourt Doctrine, was first developed by a Foreign Minister of Ecuador.[36] The doctrine was embodied in a treaty signed in 1907 by five Central American republics and stands in direct contrast to the Estrada Doctrine.[37] In attempting to encourage democratic and constitutional government, the doctrine refuses to recognize any government that comes to power through extra-constitutional means until a free election is held and new leaders are elected.[38] The Tobar Doctrine is generally criticized for its substantial interference with the domestic political processes of sovereign states, and because it bars revolutionary change as a method to overthrow even corrupt and despotic governments.[39]

Instrumentalities of unrecognized nations ordinarily cannot obtain access to U.S. courts.[40] The leading case denying an unrecognized government access to U.S. courts is *Russian Socialist Federated Soviet Republic v. Cibrario*,[41] where the court denied standing to the Soviet Government to

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> and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign regimes.
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> Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities.

2 M. WHITEMAN, *supra* note 8, at 85.

[34] L. GALLOWAY, *supra* note 25, at 8.

[35] *Id.* at 9.

[36] *Id.* at 10.

[37] *Id.*

[38] *Id.* One writer has noted: "If the Estrada Doctrine mode of approach assumed automatic recognition of new governments, then it might be said that, for practical purposes, the Tobar Doctrine implied automatic nonrecognition." Needler, *United States Recognition Policy and the Peruvian Case*, INTER-AM. ECON. AFFS. 61, 67 (1963) (quoted in L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS 10 (1978)).

[39] L. GALLOWAY, *supra* note 25, at 10.

[40] *See, e.g.*, Russian Socialist Federated Soviet Republics v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923).

[41] 235 N.Y. 255, 139 N.E. 259 (1923). *Cibrario* was not the first case to state the general rule that unrecognized governments have no standing to sue in a country's courts. In 1823, Lord Chancellor Eldon stated: "What right have I, as the King's judge, to interfere upon the subject of a contract with a country which he does not recognize." Jones v. Garcia Del Rio, 1 Turn. & Rus. 297, 299, 37 Eng. Rep. 1113, 1114 (Ch. 1823). An earlier declaration of the rule may be found in City of Berne in Switzerland v. The Bank of England, 9 Ves. 348, 32 Eng. Rep. 636 (Ch. 1804). The Hornet, 12 F. Cas. 529 (No. 6,705) (D.C.N.C. 1870) was the first United States federal case on point. The rule was firmly established in the federal courts in the "Russian Ship Cases," where the unrecognized Soviet government unsuccessfully attempted to secure possession of certain ships held by the defunct but still recognized Kerensky government. *See* The

recover funds misappropriated by a Soviet Government purchasing agent working in New York City. The court based its decision on comity, "that reciprocal courtesy which one member of the family of nations owes to the others," which could only be extended to other governments by the executive act of recognition.[42] The *Cibrario* court stated that

> to hold otherwise might tend to nullify the rule that public policy must always prevail over comity . . . . [T]o permit . . . [the Soviet Government] to recover in our courts funds which might tend to strengthen it or which might even be used against our interests would be unwise. We should do nothing to thwart the policy which the United States has adopted.[43]

There was no comity between the two states since the Russian Government was not recognized by the United States. Therefore, the Russian Government was not entitled to the privilege of suing in the courts of the United States.[44]

Due to the harshness of the nonaccess rule, several exceptions have been created by the courts. The *de facto* exception was first suggested in *United States v. Insurance Companies*,[45] a post-Civil War case involving two insurance companies created by the Georgia legislature while Georgia was not recognized by the Union.[46] If the court had strictly followed the nonaccess rule, the insurance companies should not have been allowed access to the courts, but the Supreme Court sustained their standing to sue, reasoning that Georgia had a *de facto* existence if not a *de jure* existence.[47] The acts of the Georgia Legislature were given effect because "[t]hey were mere ordinary legislation, such as might have been had

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Penza, 277 F. 91 (E.D.N.Y. 1921); The Rogdai, 278 F. 294 (N.D. Cal. 1920); The Rogdai, 279 F. 130 (N.D. Cal. 1920). *See also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 205 (Tent. Draft No. 2, 1981):

> § 205 Effect of Non-Recognition: Law of the United States
>
> Under the Law of the United States:
>
> (1) an entity not recognized as a state, or a regime not recognized as the government of a state is ordinarily denied access to courts in the United States . . . .

[42] 235 N.Y. at 258, 139 N.E. at 260. *See* Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 108, 34 A. 714, 716 (1895):

> What is termed the comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions.

[43] 235 N.Y. at 263, 139 N.E. at 262.

[44] *Id.* The *Cibrario* rule has been criticized because it may deal unfairly with an unrecognized government. *See, e.g.*, Alder, *supra* note 9, at 40. The absolute rule of *Cibrario* has also been criticized on other equitable grounds. *See, e.g.*, JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933); Borchard, *The Unrecognized Government in American Courts*, 26 AM. J. INT'L L. 261, 266 (1932); Dickensen, *The Unrecognized Government or State in English and American Law*, 22 MICH. L. REV. 29, 118, 123 (1923); Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 COLUM. L. REV. 544, 551 (1925); Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275, 298-99 (1962).

[45] 89 U.S. (22 Wall.) 99 (1874).

[46] *Id.* at 99.

[47] *Id.* at 101, 104.

there been no war, or no attempted secession; such as is of yearly occurrance in all states of the Union."[48]

A more recent application of the *de facto* principle is presented by *Upright v. Mercury Business Machines Co.*,[49] where the plaintiff was the assignee of a trade acceptance drawn on and accepted by the defendant as payment for typewriters sold by a foreign corporation and delivered to the defendant by the foreign corporation. The defendant alleged that the foreign corporation was an instrumentality of the East German Government, which is not recognized by the United States, and therefore, the assignee of the foreign corporation should not have been granted standing to sue in a U.S. court.[50] The court held the defense to be insufficient:

> [I]t is insufficient for defendent merely to allege the nonrecognition of the East German Government and that plaintiff's assignor was organized by and is an arm and instrumentality of such unrecognized East German Government. The lack of jural status for such government . . . is not determinative of whether transactions with [the corporation] will be denied enforcement in American courts, so long as the government is not the suitor.[51]

The court used the *de facto* principle to arrive at its decision.[52] The court stated that although a government may be unrecognized, it may nevertheless have *de facto* existence which is juridically cognizable, since its acts, such as creating corporations, may affect private rights and obligations arising either from activity in, or with persons or corporations within, the territory controlled by such *de facto* government.[53] Since the *Upright* court found no policy against trade with East Germany, and the typewriters passed openly through U.S. customs, the court recognized the acts upon which the plaintiff's claim rested.[54] The *de facto* acts will only be recognized so long as they are not inimical to the aims and purposes of public or national policy.[55] Thus, the *de facto* principle is utilized when private litigants and rights are involved and there is little danger of

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[48] *Id.* at 103-04.

[49] 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961).

[50] *Id.* at __, 213 N.Y.S.2d at 419.

[51] *Id.* at __, 213 N.Y.S.2d at 421 (footnote omitted).

[52] *Id.* at __, 213 N.Y.S.2d at 419. The most notable expression of the *de facto* principle is the formulation of the test by which the effect and validity of the enactments of the Confederate States would be determined by the United States Supreme Court:

> It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though [unrecognized] government . . . .

Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1868).

[53] 13 A.D.2d at __, 213 N.Y.S.2d at 419. *See also* Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Alder, *supra* note 9, at 40.

[54] 13 A.D.2d at __, 213 N.Y.S.2d at 423-24.

[55] *Id.* *See* Alder, *supra* note 9, at 40-41.

invading the domain of the political branch.[56]

Another exception to the general rule of nonaccessibility is the "corporate" or "separate juridical entity" exception. The "corporate" exception is closely related to the *de facto* exception. However, the "corporate" exception is usually utilized when the foreign instrumentality involved in the suit is either owned by the unrecognized government or is a branch of the unrecognized government,[57] whereas the *de facto* exception involves instrumentalities created by "mere ordinary legislation."[58]

A decision utilizing the "corporate" exception is *Amtorg Trading Corporation v. United States*.[59] Amtorg, a New York corporation controlled by the Soviet Government through stock ownership, was accused of dumping products onto U.S. markets.[60] The Soviet Government was not recognized by the United States at the time, but the court refused to pierce the corporate veil and recognize the Soviet control, resulting in Amtorg, a corporation of an unrecognized government, being granted standing to appeal in a U.S. court.[61]

A more recent decision illustrating the application of the "corporate" exception is *Federal Republic of Germany v. Elicofon*.[62] In *Elicofon*, the Federal Republic of Germany (West Germany) brought an action against Elicofon to recover several valuable paintings that were stolen during World War II.[63] The Kunstsammlungen Zu Weimar (Weimar Art Collection), which had custody over the art collection from which the paintings were stolen, sought leave to intervene in the suit.[64] The Weimar Art Collection is a juristic entity existing under the laws of the German Democratic Republic (East Germany), a government unrecognized by the United States.[65] The Weimar Art Collection alleged that it was a separate juristic entity by virtue of a decree issued by the Minister of Culture of the German Democratic Republic.[66] The court ordered a supplemental hearing to determine the status of the Weimar Art Collection after determining that the German Democratic Republic had no standing to sue since it was unrecognized by the United States:

> If, after a hearing, it is found that the Weimar Art Collection is an arm

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[56] *See* Alder, *supra* note 9, at 41.

[57] *See, e.g.*, Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

[58] *See supra* note 48 and accompanying text.

[59] 71 F.2d 524 (C.C.P.A. 1934).

[60] *Id.* at 527.

[61] *Id.* at 527-28. *Amtorg* may be a less persuasive holding than *Insurance Companies* for the "corporate," or "separate juridical entity," exception because Amtorg, although controlled through stock ownership by an unrecognized government, was a corporation created within the United States. The corporations in *Insurance Companies* were created by an unrecognized government outside the United States that existed during the Civil War; however, they were granted standing to sue.

[62] 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

[63] 358 F. Supp. at 749.

[64] *Id.*

[65] *Id.* at 750.

[66] *Id.*

> or instrumentality of the [German Democratic Republic], the court will have no choice but to hold that it too is barred from suit. On the other hand, facts may be developed at the hearing which indicate that the Weimar Art Collection is sufficiently independent of the [German Democratic Republic] to be free of the latter's disability.[67]

The court filed a supplemental opinion analyzing the articles of incorporation of the Weimar Art Collection,[68] and found that the property of the Collection was nationally owned.[69] Therefore, the court concluded, the Weimar Art Collection was "performing a governmental function as an arm and agency of the [German Democratic Republic]"[70] and was not free of the German Democratic Republic's disability.[71] However, if the Weimar Art Collection had been sufficiently independent of the German Democratic Republic, it might have fit into the "corporate" exception.[72] Thus, the "corporate" exception may be utilized when an instrumentality owned by an unrecognized government is sufficiently detached from the political nature of the state's actions.

When diplomatic relations have been severed with a recognized government, the privilege of resorting to the courts of the United States has not likewise been withdrawn.[73] In *Banco Nacional v. Sabbatino*,[74] an instrumentality of the Cuban Government brought suit against a commodities broker for conversion of bills of lading, and against a receiver for certain injunctive relief. At the time of the suit, the United States recognized Cuba; however, diplomatic relations had been severed.[75] The respondents argued that the severance of diplomatic relations with Cuba should close the courts of the United States to the Cuban Government, but the Supreme Court did not agree and stated that "lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."[76]

The Court also discussed the executive's function of recognizing foreign governments and its significance when diplomatic relations are severed:

> It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control. Political recog-

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67 *Id.* at 753.

68 *Id.* at 757-59.

69 *Id.* at 756.

70 *Id.*

71 *See supra* text accompanying note 69.

72 *See generally* Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934); United States v. Insurance Companies, 89 U.S. (22 Wall.) 99 (1874).

73 *See* 544 F. Supp. at 863. *See generally supra* text accompanying note 24.

74 376 U.S. 398 (1964).

75 *See id.* at 410.

76 *Id.*

> nition is exclusively a function of the Executive. *The possible incongruity of judicial "recognition," by permitting suit of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken.*[77]

The *Ronair* court granted standing to an instrumentality of an unrecognized foreign government while utilizing neither the *de facto* nor the "corporate" exception to the general rule. Thus, the decision may represent the creation of a new exception to the general rule of nonaccess for unrecognized foreign governments.

In *Ronair*, Ronair moved to dismiss, arguing that the court was without jurisdiction to adjudicate the contract dispute and granting standing to TAAG "would eliminate the fundamental political sanction of nonrecognition, and thus undermine the right of the executive branch to control the foreign policy of the United States."[78] TAAG raised four arguments in response to Ronair's motion to dismiss. First, TAAG contended that "recognition" is no longer used as a means of influencing foreign regimes and has been abandoned by the Department of State for all practical purposes, so that the judiciary should discontinue the practice of denying unrecognized governments standing to sue.[79] Second, TAAG argued that the diversity jurisdiction statute[80] draws no distinction between recognized and unrecognized governments, and therefore, the court had jurisdiction.[81] Third, TAAG asserted that it must be considered apart from its parent country because it is a separate and distinct juridical entity.[82] Last, TAAG argued that since a commercial transaction was involved in the suit, and since the Department of Commerce had reflected its approval by issuing an export license for the Boeing aircraft, fairness dictated that the suit proceed.[83]

In support of its first argument that the State Department has abandoned "recognition," TAAG introduced a letter from the State Department stating that it would be consistent with U.S. foreign policy interests to allow TAAG to have standing to prosecute its claim.[84] TAAG argued

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[77] *Id.* at 410-11 (emphasis supplied).

[78] 544 F. Supp. at 860.

[79] *Id.*

[80] 28 U.S.C. § 1332(a)(4) (1976). For text of statute, see *infra* text accompanying note 88.

[81] 544 F. Supp. at 860.

[82] *Id.* at 860-61.

[83] *Id.* at 861.

[84] The letter stated in pertinent part:

> The United States does not maintain, and has never maintained diplomatic relations with the People's Republic of Angola. At the same time, the United States Government has not discouraged trade between the United States and Angola. The volume of trade between the two countries in 1980 was $638.6 million, making the United States one of Angola's largest trading partners. The Export-Import Bank of the United States has granted substantial credits for U.S. exports to Angola.
>
> In these circumstances, the Department of State believes that allowing access to U.S. courts by Angolan airline TAAG, a State-owned business enterprise, for the resolution of a claim arising out of a purely commercial transaction, would be consistent with the foreign policy interests of the United States.

Id. at 861 [hereinafter cited as Letter].

that by avoiding the use of the word "recognition," the letter signaled "abandonment of the recognition dichotomy as a vehicle for exerting pressure on foreign governments."[85] In addition, TAAG argued that the State Department's position concerning the litigation should be controlling.[86]

The court stated that the starting point in resolving the issue was the diversity statute itself.[87] 28 U.S.C. § 1332(a)(4) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . .
>
> . . . .
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.[88]

Section 1603 states:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.[89]

The court conceded that TAAG may be a separate corporate entity for purposes of section 1603(a),[90] thus opening the door to the "corporate" exception to the nonaccess rule.[91] Rather than utilizing the exception, however, the court discussed section 1603 in light of the federal common law principles in existence at the time of the section's adoption.[92] The court noted that *de jure* or *de facto* recognition is a function of the executive,[93] and that the general rule provides that unrecognized governments are denied access to U.S. courts.[94] Moreover, the court stated, the nonaccess rule has been affirmed despite the commercial realities of current international affairs.[95]

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85 *Id.*

86 *Id.*

87 *Id.*

88 28 U.S.C. § 1332(a)(4) (1976).

89 *Id.* § 1603(a)-(b).

90 544 F. Supp. at 862.

91 *See supra* text accompanying notes 59-72.

92 544 F. Supp. at 862.

93 *See id. See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); National City Bank v. Republic of China, 348 U.S. 356, 358 (1955); Jones v. United States, 137 U.S. 202, 212 (1890).

94 *See* 544 F. Supp. at 862. *See generally* Pfizer, Inc. v. India, 434 U.S. 308, 319-20 (1978); Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938).

95 *See* 544 F. Supp. at 862. The district court did not define commercial realities; however,

In its discussion of Ronair's motion to dismiss, the court noted the two exceptions to the nonaccess rule.[96] The court stated that, even though wholly owned by the Angolan government, TAAG may well be a discrete and independent entity.[97] However, the court stated that it need not examine whether TAAG was a separate entity because there existed a more compelling reason why TAAG should be allowed standing.[98]

The court noted that ordinarily the executive is steadfastly opposed to an unrecognized government being granted access to U.S. courts:

> In this case, however, not only did the Department of Commerce, in consultation with the Department of State, place its imprimatur on TAAG's commercial dealings with Ronair by issuing a license to export the Boeing aircraft to Angola for TAAG's use, but the State Department itself has unequivocally stated that allowing TAAG access to this Court would be consistent with foreign policy interests of the United States.[99]

Relying on the State Department letter was not necessarily inconsistent with the constitutional and policy underpinnings of the general rule of nonaccess, since recognized foreign nations have long had standing in U.S. courts.[100] In *Ronair*, the letter may have served the purpose of recognition. To this end the court stated:

> [T]he purpose of denying the privilege of suit to governments not recognized by the executive branch is solely to give full effect to that branch's sensitive political judgments. Thus, where the executive branch, either by its actions or words, evinces a definite desire to remove the impediment to a suit brought by an unrecognized government, or an instrumentality thereof, that determination necessarily frees this Court from any strictures placed on the exercise of its jurisdiction.[101]

Had the *Ronair* court analyzed the case in light of the recognized exceptions to the nonaccess principle, rather than relying on the State Department letter, the court might still have found that TAAG should be allowed standing. Angola, although not recognized by the United States, may still have *de facto* status which is juridically cognizable.[102] The letter from the State Department lends credence to the argument

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in light of the present case, one could surmise that in the commercial realities of current international affairs, corporate entities transacting business usually do not consider that they might not be granted access to a foreign court when they have been wronged.

96 *Id.* at 863.

97 *Id.*

98 *Id.*

99 *Id.* The court also stated:

> Arguably, the Department of Commerce's act in permitting Ronair to transact business with TAAG could in itself be considered a grant of standing to litigate any claim arising out of that transaction in the courts of the United States. Considered in conjunction with the express assertion by the State Department that this case should be allowed to proceed, any lingering obstacles to this suit have been conclusively removed.

Id. (citation omitted). *See generally* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 752 n.4 (1972).

100 *See* 544 F. Supp. at 863.

101 *Id. See also* Pfizer, Inc. v. India, 434 U.S. at 318-19.

102 *See supra* note 53 and accompanying text.

that Angola had a *de facto* government, since the United States actively traded with the Angolan government.[103] In addition, the letter provides evidence that there was no policy against trade with Angola.[104] Moreover, TAAG may have been a "discrete and independent entity"[105] created by "mere ordinary legislation"[106] that affected private rights and obligations.[107] Arguably, however, a strict application of the *de facto* exception would exclude TAAG because the *de facto* exception generally applies only to private parties, not to government-owned entities like TAAG.[108]

The "corporate," or "separate juridical entity,"[109] exception might have applied because, although wholly owned by the Angolan government, TAAG might have been a "discrete and independent entity"[110] sufficiently detached from the political nature of the Angolan government. The State Department letter characterizing the sale of the aircraft as a "purely commercial transaction"[111] lends support to the argument that TAAG was sufficiently detached from the political nature of the Angolan government.

Even though the court did not utilize the recognized exceptions to the general rule of nonaccess, *Ronair* was fairly decided. TAAG may have been defrauded by several U.S. corporations, and in the interest of fairness, should have been allowed to pursue its claim in a U.S. court.[112] TAAG was involved in a "purely commercial transaction"[113] and had a license from the U.S. Department of Commerce to purchase the aircraft; therefore, TAAG could reasonably have expected that a U.S. court would be available in which it could litigate a dispute involving the commercial transaction. One commentator has noted that "[i]t seems neither equitable to permit, and even help, an unrecognized government to bring funds into the United States and then refuse it a remedy when, according to United States law, a wrong is committed against them, nor equitable to allow a wrongdoer to unjustly enrich himself."[114]

By choosing not to analyze *Ronair* in light of the recognized exceptions to the rule of nonaccess for unrecognized governments and their instrumentalities, the court seems to have created a "new exception" to the rule. Under the "new exception," if the executive branch of the United States Government takes the position that a suit would not vio-

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[103] *See* Letter, *supra* note 84.
[104] *Id*. *See supra* note 55 and accompanying text.
[105] 544 F. Supp. at 863.
[106] *Insurance Companies*, 89 U.S. at 103. *See also supra* note 48 and accompanying text.
[107] *See supra* note 53 and accompanying text.
[108] *See supra* notes 53, 56 and accompanying text.
[109] *See generally supra* notes 57-72 and accompanying text.
[110] 544 F.2d at 863.
[111] Letter, *supra* note 84.
[112] *See generally* Alder, *supra* note 9, at 40-41.
[113] Letter, *supra* note 84.
[114] Alder, *supra* note 9, at 40.

late the foreign policy of the United States, then the suit should be allowed to continue. However, the "new exception" is not really new; it is simply a reflection of the policy behind the nonaccess rule.

The executive has the exclusive authority to recognize foreign sovereigns.[115] To avoid infringing upon the executive's political judgments, U.S. courts are precluded from determining or affecting recognition of a foreign state or government.[116] However, when the State Department has placed its "imprimatur" upon a commercial deal involving an instrumentality of an unrecognized foreign sovereign and has unequivocally stated that allowing the instrumentality access to a U.S. court would be consistent with U.S. foreign policy interests,[117] the "possible incongruity of judicial 'recognition' "[118] no longer exists. The court has not usurped the recognition power of the executive because the executive has made the political judgment. Therefore, the *Ronair* court's decision to grant TAAG standing to sue was consistent with the policy behind the rule excluding unrecognized foreign sovereigns from U.S. courts.

Although a letter may not be forthcoming from the State Department for every instrumentality of an unrecognized foreign government, future plaintiffs should be encouraged by the *Ronair* court's willingness to look behind the nonaccess rule to the policy of recognition. Future courts, facing similar facts, might now be more willing to follow the same path.

—RICHARD C. BELTHOFF, JR.

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[115] *See supra* notes 13-16 and accompanying text.
[116] *See* Alder, *supra* note 9, at 36.
[117] *See supra* note 99 and accompanying text.
[118] *Sabbatino*, 376 U.S. at 410. *See also supra* note 77 and accompanying text.